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Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, *et al.*,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The San Francisco Lawyers' Committee for Urban Affairs ("S.F. Lawyers' Committee") began in 1968 as the Northern California affiliate of the Lawyers' Committee for Civil Rights Under Law. It is organized as a California nonprofit corporation and is classified as a tax-exempt public charity under Section 501(c)(3) of the Internal Revenue Code. The Committee's program involves the provision of *pro bono* legal representation to poor or minority individuals. Its most recent activities include participation in various suits concerning racial isolation in elementary and secondary schools in the San Francisco Area. The Committee also was active in the

campaign against the enactment of Proposition 1,[1] which is at issue in this case, and has remained involved in subsequent legal challenges to its constitutionality.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Over the past eighteen years, the Committee has enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education (including school desegregation cases), employment, housing, municipal services, the administration of justice, and law enforcement.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a private civil rights organization founded in 1968, and dedicated to ensuring through law that the civil rights of Mexican Americans are protected. It has participated in numerous cases involving the educational rights of Mexican American children, including school desegregation cases.

Based on their respective experiences in representing poor and minority clients on civil rights issues, in particular regarding public education, *amici* file this brief in support of petitioners.[2]

SUMMARY OF ARGUMENT

The drafters of Proposition 1 wanted it to appear to be merely a neutral regulation of remedies which California state courts may use in certain school desegregation cases brought under the California Constitution. They failed to obscure its true purpose. In fact, the measure violates a fundamental precept of the four-

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[1] CAL. CONST. art. I, § 7(a) (hereinafter cited as "Proposition 1").

[2] The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

teenth amendment: it purposefully isolates a particular class of citizens on the basis of their race (minority students seeking racial integration of California public schools), and singles that class out for disfavored treatment by the state judiciary.

Amici join with the petitioners in urging this Court to reverse the California Court of Appeal's judgment sustaining the constitutionality of Proposition 1, and they embrace fully the arguments to this end made in petitioners' brief. Amici submit this brief to draw the Court's attention to certain arguments against Proposition 1 which we think deserve particular emphasis and clarification. To that extent, this brief will not restate all of the points made in petitioners' brief, but will focus on four distinct arguments.

First, *amici* will demonstrate that in addition to its facial infirmities, Proposition 1 was passed with a specific intent to discriminate against black and other minority school children in California. We will draw the Court's attention to certain material, both in the record and judicially noticeable, showing that Proposition 1 cannot be viewed in isolation, but must be seen as the latest embodiment of a virulent racial prejudice which has infected California public and private life continuously since before the Civil War.

Second, *amici* urge that there is only one alternative to reversal of the Court of Appeal's ruling on the constitutionality of Proposition 1: a remand for additional fact-finding on the purpose behind Proposition 1. We think ample evidence exists to show that Proposition 1 is unconstitutional because it was adopted for the purpose of discriminating against minority students. However, the trial court never reached this issue, and the Court of Appeal erroneously sustained Proposition 1's constitutionality without ever giving petitioners a full and fair opportunity to develop factual evidence critical to the issue.

Third, *amici* will demonstrate that Proposition 1 limits remedies which may be necessary to vindicate *federal* constitutional rights in cases of school segregation which violates the fourteenth amendment. It does this by linking state court jurisdiction rigidly to federal court jurisdiction, even though the lower federal courts can have their jurisdiction curtailed in certain instances by Congress pursuant to article III of the Constitution. This "linkage" is a dangerous and unconstitutional encroachment on the fundamental principle of due process that state courts of general jurisdiction may not have their jurisdiction narrowed if the consequence is the denial of any meaningful remedy for the vindication of a federal right.

Finally, *amici* submit that the Court of Appeal improperly decided the question whether the Los Angeles public school system is segregated in violation of the fourteenth amendment. In 1970, the trial court gave focused attention to this issue and concluded that the segregation of the Los Angeles public schools was *de jure*. This finding was accepted by the California Supreme Court in 1976. Nevertheless, the court below declared that the law had changed since that time and, relying upon its reading of subsidiary factfinding by the trial court in 1970, it overruled the earlier holdings. If the Court of Appeal felt it necessary to reopen the question of *de jure* segregation in Los Angeles, it should at the least have examined the record rather than merely reviewed the 1970 findings. Because the court below incorrectly reached out to decide the issue, an appropriate course for this Court to follow is to remand for additional fact-finding and the application of current fourteenth amendment legal standards to an updated record.

ARGUMENT

I. PROPOSITION 1 MUST BE JUDGED IN THE HISTORICAL CONTEXT OF LONGSTANDING OFFICIAL SUPPORT FOR SEGREGATION AND DISCRIMINATION IN CALIFORNIA, WHICH REINFORCES THE OTHER EVIDENCE SHOWING THAT ITS PASSAGE WAS MOTIVATED BY RACIAL *ANIMUS* AND AN INTENT TO DISCRIMINATE

It has long been this Court's view that in cases challenging state legislation or official action as racially discriminatory, the historical context is an important evidentiary factor to be weighed. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977); *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967), and cases cited therein. The historical context of Proposition 1 compels the conclusion that its passage was intended to, and did, accomplish the racially motivated purpose of returning minority children in Los Angeles and throughout the State of California to segregated schools, just as a similar historical context caused this Court in *Reitman* to strike down another California voter initiative, Proposition 14. Although the Court of Appeal failed to take this background into account in assessing the validity of Proposition 1 (*see* Argument II *infra*), much of its outline is established by materials subject to judicial notice.

Amici agree fully with the petitioners that evaluation of the other factors specified by this Court's decision in *Arlington Heights*, 429 U.S. at 266-68, leads to the inevitable judgment that Proposition 1 intentionally discriminates against minority students in California. In this section of our brief, we assemble, for the Court's additional consideration, significant indicia of the historical context surrounding Proposition 1.

The historical record demonstrates a longstanding, unwavering pattern of governmental support for—or out-

right compulsion of—racial segregation and discrimination in every area, including public education. To the extent that the actions of the California Legislature, courts, or Department of Education began to reflect any different attitude, the voters of the state have consistently sought to return to a prosegregation, racially discriminatory public policy. For example, this Court noted in *Reitman*, 387 U.S. at 374, that the historical background of Proposition 14 included a 1961 legislative measure that outlawed racially restrictive covenants. That legislative measure was significant because California citizens had long used such covenants to segregate racial minorities, and California courts had consistently enforced them. *See Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596 (1919). When California voters rose up to undo this legislative progress by passing Proposition 14, the inference of racial motivation behind the initiative was compelling. Similarly, Proposition 1 represents but the latest in a series of attempts by the California electorate to overturn antidiscrimination steps taken by any branch of state government, and to preserve school segregation.

For the Court's convenience, we sketch the contours of the historical record in tabular form at the end of this section of the brief, at 8-11, *infra*, and summarize it here as follows:

Although California was not admitted to the Union as a slave state, within a few years its Legislature prohibited racially mixed schools, banned Negroes from testifying in judicial proceedings involving whites, and excluded blacks and Chinese individuals from public office. The state's official policy of racial separation and white supremacy continued unabated well into the twentieth century and was sensitive to every shift in popular prejudice. For example, legislation mandating separate schools was enacted in 1885 for Chinese children, in 1909 for Indian children, and in 1921 for Japanese children.

State officials enforced and encouraged white supremacist beliefs and the practice of racial segregation. In 1867, a year before California refused to ratify the fourteenth amendment, the Governor urged racial separation and specifically noted the operation of separate schools for "colored" children in the State. As indicated above, the California courts consistently enforced racially restrictive covenants by which housing patterns were kept segregated. By the 1930's California school district officials had developed techniques for maintaining segregated schools by selecting sites deep in racially homogeneous neighborhoods, and in 1953 the California Attorney General's Office frankly informed this Court that school district attendance zone boundaries were often gerrymandered for racial reasons. Despite early enactment of a civil rights measure, public accommodations remained largely segregated until the relatively recent past.

Efforts by the California Legislature and courts in the 1960's and 1970's to alter the state's traditional public policy to achieve greater equality of opportunity in the sensitive areas of housing and education were greeted with resistance and defiance. As noted above, Proposition 14 attempted to nullify statutory fair housing measures, and both the California Supreme Court and this Court found the initiative invidiously discriminatory and unconstitutional in *Reitman*. A subsequent legislative measure and a separate initiative, both designed to prevent school integration, were declared unconstitutional by the California Supreme Court, in one instance, and construed to avoid a declaration of unconstitutionality, in the other. Finally, the intentions of Proposition 1's supporters are illuminated by the action of its sponsor, *after its passage*, in initiating legislation (vetoed by the Governor) which would have instructed California courts applying federal decisional law under Proposition 1 to ignore this Court's constitutional holdings in *Columbus Board of Education v. Penick*, 443 U.S.

449 (1979) and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), because they were viewed as too favorable to school desegregation.

In sum, the historical context of Proposition 1 places the measure squarely within a long tradition of state policies to further racial separation and discrimination. Like the other evidence discussed by the petitioners, it points to the conclusion that Proposition 1 is invidiously discriminatory. The Court below erred in sustaining its constitutionality and applying it to this case.

Historical Overview of Discrimination in California

1849	California admitted to the Union.
	First California Constitution limits suffrage and legislative office to white males.[3]
1850	First California Legislature passes anti-miscegenation statute.[4]
	First California Legislature enacts measures to prohibit giving of testimony by non-whites (defined as those having 1/8 or more non-white blood) in judicial cases involving whites.[5]
1854	Separate schools for black pupils established in Sacramento and San Francisco; state law provides for school census only of white children and apportionment of state school funds based upon census only of white children.[6]
1863	California Legislature enacts law requiring the creation of separate schools for non-white pupils by local districts.[7]

[3] CAL. CONST., art. II, § 106; art. IV, § 116 (1849).

[4] 1850 Cal. Stats., ch. 140, at 424.

[5] 1850 Cal. Stats., ch. 99, § 14, at 230; ch. 142, § 306, at 455.

[6] B. REAMS & P. WILSON, SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES: A SURVEY OF STATE SEGREGATION LAWS 1865-1953; PREPARED FOR UNITED STATES SUPREME COURT IN RE: BROWN VS. BOARD OF EDUCATION OF TOPEKA 40-41 (1975) [hereinafter cited as REAMS & WILSON].

[7] Act of April 6, 1863, Cal. Stats., ch. 159, § 68, at 210. *See also* Act of March 22, 1864, 1863-64 Cal. Stats., ch. 209, § 13, at 213; Act of March 24, 1866, 1865-66 Cal. Stats. ch. 342, §§ 57-59, at 398; Act of April 4, 1870, 1867-70 Cal. Stats., ch. 556, § 56, at 838-39; CAL. POL. CODE §§ 1662, 1669 (1872).

1865, 1867	California Governor, in address to Legislature, notes existence of separate schools for non-white children in State.[8]
1868	California Legislature refuses to ratify fourteenth amendment.
1874	Segregation of black students upheld by California Supreme Court.[9]
1880	California Legislature repeals statutes requiring school segregation.[10]
1885	California Supreme Court orders admission of Chinese student to white school in San Francisco.[11]
	California Legislature, in reaction to decision, reenacts school segregation statute to apply to "Mongolian and Chinese" students, preventing admission of child.[12]
1886	Supreme Court of United States rules that San Francisco authorities discriminated against Chinese in administration of laundry ordinance.[13]
1902	Segregation of Chinese students upheld in federal court.[14]
1909	California Legislature amends Education Code to authorize separate schools for Indian students.[15]
1919	California Supreme Court enforces racially restrictive covenants.[16]
1921	California Legislature amends Education Code to require separate schools for Japanese Children.[17]

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[8] REAMS & WILSON at 34; 1867-68 CAL. STATE JOURNAL 32.

[9] Ward v. Flood, 48 Cal. 36 (1874).

[10] Act of April 7, 1880, 1880 Cal. Stat. Amend., at 47.

[11] Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

[12] REAMS & WILSON, at 42-43; Wysinger v. Crookshank, 82 Cal. 588, 23 P. 54 (1890).

[13] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[14] Wong Him v. Callahan, 119 F. 38 (C.C.N.D. Cal. 1902).

[15] REAMS & WILSON, at 42-43; *see* Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924).

[16] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596 (1919).

[17] REAMS & WILSON, at 42-43.

1925	California Supreme Court upholds separate school requirement for Indian pupils.[18]
1933	Los Angeles school district segregates Mexican-American children by site selection and school construction policies.[19]
1934-70	Pasadena school district officials use numerous devices to maintain racial segregation in the schools.[20]
1936-40, 1960-70	School construction, attendance zoning, racial assignment and within-school segregation used by Oxnard School District officials to isolate Mexican-American pupils.[21]
1942	Widespread racial and ethnic segregation found by Los Angeles sheriff to affect public life.[22]
1947	Los Angeles County Counsel defends anti-miscegenation law on grounds that "Negroes are socially inferior and have so been judicially recognized." [23]

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[18] Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924). The Court held that state school authorities were responsible for providing a "separate but equal" education for Indian students even in districts in which Indian children could attend federal institutions.

[19] A Los Angeles district official reported:

> [O]ur educational theory does not make any racial distinction between Mexican and native white population. However, pressure from white residents of certain sections forced a modification of this principle to the extent that certain neighborhood schools have been forced to absorb the majority of Mexican pupils of the district.

Reynolds, *The Education of Spanish Speaking Children in Five Southwestern States*, 1933 U.S. OFFICE OF EDUCATION BULLETIN No. 11, *quoted in* C. WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975 112 (1976).

[20] Spangler v. Pasadena City School Dist., 311 F. Supp. 501 (C.D. Cal. 1970).

[21] Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974).

[22] 1942 report of Los Angeles County Sheriff noting segregation and exclusion in "swimming plunges, public parks and even in schools" as well as theaters and restaurants, *quoted in* I. HENDRICK, THE EDUCATION OF NON-WHITES IN CALIFORNIA 1849-1970 99 n.5 (1977).

[23] Perez v. Sharp, 32 Cal. 2d 711, 727, 198 P.2d 17, 26-27 (1947).

1953	California Attorney General advises Supreme Court of the United States that racial segregation of students is practiced by some school districts in State.[24]
1957	Survey finds widespread segregation in public accommodations despite state civil rights law.[25]
1959-69	School construction and gerrymandering of attendance zone boundaries used to segregate schools in Richmond school district.[26]
1964	Voters adopt Proposition 14 for purpose of repealing fair housing laws and protecting right of landlords to discriminate on grounds of race.[27]
1970	California Legislature adopts Wakefield amendment to Education Code for purpose of prohibiting use of transportation for school integration; later construed as ineffective so as to avoid constitutional question.[28]
1972	Voters adopt Proposition 21 to rescind State Education Department policy favoring elimination of racial imbalance and to prevent assignment on racial basis to overcome segregation; held unconstitutional.[29]
1979	Following passage of Proposition 1 by California voters, Legislature passes measure to limit incorporation of federal standards deemed too favorable to litigants seeking desegregation.[30]

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[24] REAMS & WILSON, at 47.

[25] ". . . 'after having a civil rights law for 50 years . . .' less than 20 percent of California's hotels and motels will accommodate Negroes," Chicago Defender, April 27, 1957, at 20.

[26] Johnson v. Richmond Unified School Dist., No. 112094 (Super. Ct., Contra Costa County, April 3, 1972).

[27] Reitman v. Mulkey, 387 U.S. 369 (1967).

[28] San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309, *cert. denied sub nom.* Fehlhaber v. San Francisco Unified School Dist., 401 U.S. 1012 (1971).

[29] Santa Barbara School Dist. v. Superior Ct., 13 Cal. 3d 315, 530 P.2d 605, 18 Cal. Rptr. 637 (1975).

[30] *See* Comment, *Proposition 1 and Federal Protection of State Constitutional Rights*, 75 NW. U.L. REV. 685, 704-05 n.120 (1980); Note, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 GOLDEN GATE U.L. REV. 611, 666 n.251 (1980).

II. WHILE THERE IS ENOUGH EVIDENCE IN THE EXISTING RECORD TO SHOW PROPOSITION 1 IS UNCONSTITUTIONAL, THERE IS NOT ENOUGH EVIDENCE TO SUSTAIN ITS CONSTITUTIONALITY

In the first section of this brief we outlined how Proposition 1 grew out of California's long history of racial and ethnic discrimination. The immediate history of Proposition 1 reveals that it is intended to deprive state courts of the means to aid minority children who seek to enforce their right to attend desegregated schools. We believe that the facts in this case, illuminated by the history of Proposition 1, compel the conclusion that Proposition 1 is unconstitutional. If this Court is disposed to give consideration to the possible validity of the initiative, however, it should do so only after remanding the case for further factual development in the trial court.

In determining the validity of a measure like Proposition 1, which purports to be racially neutral, the Court must inquire not merely whether it denies minority students the equal protection of the laws by its express terms, but also whether this protection is denied "in substance and effect." Without such an inquiry, "a review by this Court would fail in safeguarding constitutional rights." *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935) (Hughes, C.J.). The Court cannot make this essential inquiry, however, unless all parties have had an opportunity to present relevant evidence, and the Court has before it a complete record developed in the trial court. Important and difficult constitutional issues cannot and should not be decided in the absence of an adequate factual record. *Time, Inc. v. Firestone*, 424 U.S. 448, 461-63 (1976); *W.E.B. DuBois Clubs v. Clark*, 389 U.S. 309, 312 (1967).

In this case, the factual record necessary to support the decision of the Court of Appeal is entirely lacking. The trial court did not reach the issue of the constitu-

tionality of Proposition 1 and rested its decision for plaintiff on other grounds. Accordingly, the subsequent decision of the Court of Appeal that Proposition 1 is constitutional is entirely unsupported by any findings of fact with respect to the history of Proposition 1, its objectives, or its impact on the plaintiffs in this case. Rather, the Court of Appeal validated Proposition 1 by relying on the brief and self-serving statement of legislative purpose appended to the measure, by indulging the negative presumption that the legislators who wrote and the voters who adopted Proposition 1 "could have been motivated without segregative intent and discriminatory purpose," and by characterizing arguments to the contrary as "pure speculation," even though petitioners had never had their full day in court on the issue of intent. 113 Cal. App. 3d at 654-55, 170 Cal. Rptr. at 509.

This Court should not permit this unsupported decision to stand. Instead it should remand the case for an examination of these essential questions in the trial court. If the Court does not do this, not just these petitioners, but all minority children attending illegally segregated schools in California will have had their right to an effective remedy decided without an opportunity for meaningful judicial review.

The decisions of this Court in *Washington v. Davis*, 426 U.S. 229, 239 (1976), *Arlington Heights, supra*, and *Personnel Administrator v. Feeney*, 432 U.S. 256 (1979), establish that in considering the validity of a purportedly neutral state constitutional amendment, like Proposition 1, an evaluation of all circumstantial and direct evidence of purpose is essential. The starting point for this inquiry is "the impact of the official action—whether it bears more heavily on one race than another." Sometimes impact alone may present so stark a picture of racial discrimination that no further inquiry is necessary. If impact alone is not clearly determinative of intent, however, the court must go on to examine other evidence, including evidence of the immediate and long-range procedural and substan-

tive history of the challenged action. *Arlington Heights*, 429 U.S. at 266-268.

A. The Constitutionality of Proposition 1 Cannot be Upheld Without an Examination of Its Impact on Minority Students

In its haste to affirm the constitutionality of Proposition 1, the Court of Appeal failed to take even the first step in this essential analysis of purpose. The Court of Appeal refused to make any meaningful evaluation of the effect of Proposition 1 on minority children. Instead, that court simply looked at the text of Proposition 1, and blithely concluded that "all the amendment does is remove from the court the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation." *Crawford v. Board of Education* (*"Crawford II"*), 113 Cal. App. 3d at 655-656, 170 Cal. Rptr. at 510. The court made no attempt to evaluate which of those "scores of remedies" could be effectively applied to existing conditions in the Los Angeles Unified School District or, indeed, to identify even one such remaining "remedy." In fact, the Court of Appeal made no determination as to whether Proposition 1 would leave the state courts with *any* effective means to alleviate segregation.

The California Supreme Court in *Crawford v. Board of Education* (*"Crawford I"*) identified the basic tools for accomplishing desegregation—redrawing neighborhood attendance zones, "pairing" or "clustering" of schools, establishment of "magnet schools" and implementation of "satellite zoning." *Crawford I*, 17 Cal. 3d 280, 305, 551 P.2d 28, 44, 130 Cal. Rptr. 724, 740 (1976). Every one of these techniques requires pupil assignment or pupil transportation. Indeed, effective desegregation of necessity almost always requires some form of pupil assignment or pupil transportation. It is the role of the school board in mandating school assignment and transportation that forms the predicate for its obligation to desegregate its schools,

and makes judicial review of its performance of that obligation so essential.

Although the trial court did not reach the issue, the record in this case illustrates how Proposition 1 will prevent California courts from ordering any effective remedy for segregation. The Los Angeles School Board refused even to provide transportation for voluntary transfers until ordered to do so by the trial court. (1970 *Findings*, ¶ IV.48).[31] The court-ordered desegregation plan which led to this appeal included a mix of the techniques indentified by the California Supreme Court, including "pairing," "cluster schools," "magnet schools," and the continuation of voluntary transfers with transportation. The plan also required the assignment of non-English-speaking Hispanic pupils in groupings which would facilitate bilingual education and ended the practice of assigning non-English-speaking Hispanic students to programs for lower-achieving students. This entire plan would be prohibited by Proposition 1. (Order After Trial Upon Plan II and the Proposed All-Voluntary Program).

Indeed, all the evidence of impact available in the record suggests petitioners will be denied any remedy at all if Proposition 1 is upheld. In 1970 the trial court concluded that the Los Angeles school board would not desegregate its schools unless compelled to do so. (1970 *Findings*, ¶ IV.47, IV.54, IV.55). Ten years later that court found that the Los Angeles Board still "did not have a course of action designed to make meaningful progress in

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[31] As noted by this Court, "Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensible remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. *In order to be effective, such a transfer arrangement must grant the transferring student free transportation* and space must be made available in the school to which he desires to move." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26-27 (1971). (emphasis added.)

the elimination of harms arising out of minority segregated schools and that [even then] the Board had not . . . resolved itself to achieve any such plan." (Opinion, Findings of Fact and Conclusions of Law after Hearing Re: Sufficiency of the Response by Respondent to the Existing Writ of Mandate and to the Order Issued Previously [hereinafter, "July 7 Order"] at 3). Moreover, the court specifically concluded that the "all voluntary" program the board proposed to implement, if permitted to do so by the court, would not desegregate *any* minority schools and reflected a lack of concern for minority students. (July 7 Order, at 4-5.)

This, with other evidence that can be adduced on remand, will establish that the legislators who proposed and the voters who adopted Proposition 1 knew and intended that it would do more than just regulate one "remedy"—it would effectively destroy any meaningful chance for the minority children in Los Angeles to challenge the school system in which they have been segregated in overcrowded schools with inferior teachers, curriculum, and physical facilities. *Crawford II*, 113 Cal. App. 3d at 643, 170 Cal. Rptr. at 501. This sort of predicted and planned disparate impact on minorities is central to assessing the constitutionality of Proposition 1, and it may be considered only if the action is remanded for that purpose.

B. The Constitutionality of Proposition 1 Cannot be Upheld Without an Examination of Its Historical Background

Even a superficial review of the history of Proposition 1 contained in the existing record, made in light of the standards established in *Reitman*, discloses sufficient indicia of discriminatory purpose to demonstrate that further examination of this history is essential before reaching any final determination that Proposition 1 does not deny minority students their federally guaranteed right to the equal protection of the laws.

This action was initiated in 1963. In 1970, the trial court first ordered the desegregation of the Los Angeles

school system. (July 7 Order, at 6-14.) That same year, legislation requiring parental consent before a child could be bused to school was added to the California Education Code.[32] In 1972, the Education Code was amended to forbid student assignment on the basis of race.[33] The California Supreme Court determined that neither statute could be constitutionally applied to prevent or impede desegregation. *San Francisco Unified School District v. Johnson*, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309, *cert. denied sub nom. Fehlhaber v. San Francisco Unified School District*, 401 U.S. 1012 (1971); *Santa Barbara School District v. Superior Court*, 13 Cal. 3d 315, 530 P.2d 605, 18 Cal. Rptr. 637 (1975).

In the meantime, the Los Angeles Board exercised every means it had to resist the order to desegregate. Indeed, the first mandatory desegregation plan was not implemented until 1978. Only a year later, when Proposition 1 was passed, the Board immediately sought to utilize the constitutional amendment to abandon any meaningful desegregation. (July 7 Order, at 6-14, 96-96).

These facts form the outline. A full evaluation of the facts on remand would establish that Proposition 1 is the culmination of a twenty-year campaign by the Board of Education and its political allies throughout the state to evade its statutory and constitutional obligation to provide desegregated education in California and to insulate this gross breach of duty from meaningful judicial review. *See* Comment, *Proposition 1 and Federal Protection of State Constitutional Rights*, 75 Nw. U.L. Rev. 685, 690-693 (1980); Note, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 Golden Gate U.L. Rev. 611, 669-681 (1980).

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[32] CAL. EDUC. CODE § 1009.5 (1970) (currently CAL. EDUC. CODE § 35350 (1978) (West)).

[33] CAL. EDUC. CODE § 1009.6 (1972) (currently CAL. EDUC. CODE § 35351 (1978) (West)).

We believe that the sensitive evaluation of the evidence mandated by this Court in *Arlington Heights* would demonstrate that the true purpose of Proposition 1 was to assist recalcitrant school boards in California, like the Los Angeles school board here, to evade their obligations to minority students and to maintain and perpetuate racial and ethnic separation in the schools free from unwelcome judicial review. The available history, at the very least, establishes a sufficient likelihood that Proposition 1 was enacted with this discriminatory intent to preclude any conclusion that it is constitutional on its face. It is therefore essential for this Court to remand this case for an examination in the trial court of the impact, and the objectives, of Proposition 1 in light of its historical context and the conditions existing prior to its enactment.

III. PROPOSITION 1 IS UNCONSTITUTIONAL BECAUSE IT DENIES THE POWER OF STATE COURTS OF GENERAL JURISDICTION TO GIVE REMEDIES WHICH ARE NECESSARY TO REDRESS CERTAIN FOURTEENTH AMENDMENT VIOLATIONS, IN CASES WHERE CONGRESS MAY ATTEMPT TO CURTAIL LOWER FEDERAL COURT JURISDICTION

For the reasons set forth below, *amici* submit that a state may not restrict the remedies which its courts may provide in suits involving federal constitutional violations.[34] This principle applies not only when the limitations on remedy are imposed directly, but also when the authority of state courts is circumscribed by making them subject to the same restraints as are the lower federal courts. Proposition 1 has precisely this prohibited effect. As a matter of fundamental California law, subject to alteration only through the tortuous process of constitutional

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[34] Such findings have been made by trial courts in this and other California school segregation actions. *E.g.*, Crawford v. Board of Educ., 17 Cal. 3d 280, 288-289, 551 P.2d 28, 32-33, 130 Cal. Rptr. 724, 728-729 (1976); Johnson v. Richmond Unified School Dist., No. 112094 (Super. Ct., Contra Costa County, April 3, 1972).

amendment, it reduces the authority of state courts in all school segregation action *pro tanto* with the authority of the lower federal courts. The availability of a remedy to effectuate the right to a non-segregated education thus will vary both with shifts in federal decisional law, and also with any legitimate exercise of Congress' authority to regulate the jurdisdiction of—or even to eliminate entirely—the lower federal courts. Even more significant, the availability of necessary remedies in fourteenth amendment school desegregation suits in California courts will be called into question while the federal constitutionality of subject-specific jurisdictional limitation measures is litigated. *See, e.g.*, Sager, *The Supreme Court, 1980 Term —Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) (hereinafter, "Sager"); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.—C.L. L. Rev. 129 (1981) (hereinafter, "Tribe").

A. As Courts of General Jurisdiction, State Courts May Not Be Limited in Their Ability to Impose Necessary Remedies for Federal Constitutional Violations

It was part of the plan of the Constitution that state courts of general jurisdiction would act as the final line of defense against unconstitutional government—both state and federal—in cases where the lower federal courts had not been given jurisdiction by Congress, or where their limited subject matter jurisdiction had been narrowed by permissible congressional regulation. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 11-12 (2d ed. 1973); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 53 (1923). Proposition 1 rigidly ties the power of state courts to give constitutionally necessary remedies to the power of federal courts to do so: a linkage that may seem innocuous until it is evaluated in the context of (a) the constitutional grant of some

measure of control over federal court jurisdiction to Congress,[35] and (b) the current interest on the part of some members of Congress to use that control to limit the remedies which federal courts may award in suits to enforce constitutional rights,[36] including remedies necessary to eliminate unconstitutional dual school systems. Of course, there are limits on Congress' powers to restrict federal court jurisdiction, for those powers must be exercised in harmony with other provisions of the Constitution. Sager, *supra* at 37-42. The same limits apply to restrictions on state court jurisdiction to adjudicate and redress claims of federal constitutional right, in light of the supremacy clause and the fundamental role of state courts in the constitutional scheme.

For instance, Congress may not withdraw jurisdiction from a federal court in a way that infringes the legitimate constitutional powers of the Executive Branch of government, or requires a federal court to find facts which are untrue to be true. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Another principle that neither Congress nor the states can violate in the guise of regulating jurisdiction is that for every violation of the federal Constitution *some* court must have jurisdiction to give those remedies which are necessary to redress the wrong. *See, e.g., Guam v. Olsen*, 431 U.S. 195, 204 (1977); *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Yakus v. United States*, 321 U.S. 414, 444 (1944); *see also* Sager, *supra*, at 41 n.70, 75-76 & n.183. Professor Hart put the matter succinctly when he wrote:

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[35] Article III, § 1 states, in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *See* Palmore v. United States, 411 U.S. 389, 400-01 (1973); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); C. WRIGHT, THE LAW OF FEDERAL COURTS § 10, at 29 (3d ed. 1976). The proposition that the lower federal courts could today be eliminated or severely restricted in their authority has been questioned. *See, e.g.*, Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

[36] See discussion *infra* at 24-25 and n.39.

"a necessary postulate of constitutional government [is] that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953).

This postulate binds state legislators and other state law-making authorities no less than Congress. The states may not restrict the jurisdiction of their own courts to give remedies which are required to vindicate federal rights. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-39 (1969) (state court must grant injunctions appropriate to the enforcement of federal civil rights "if that court is empowered to grant injunctive relief generally"); *Testa v. Katt*, 330 U.S. 386 (1947) (supremacy clause requires state court to assume jurisdiction over a suit brought under federal price control legislation). This is especially true when the jurisdiction of federal courts has been curtailed by Congress or by the unique limits on the federal judicial power contained in the Constitution. *See, e.g., General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908) (disregarding as unconstitutional a state statute making state officers immune from suit in state courts where it is assumed that "suit against state officers is precluded in the national courts by the Eleventh Amendment"); *cf. Maine v. Thiboutot*, 448 U.S. 1, 11 & n.12 (1980) (supremacy clause requires state courts to give attorneys' fees award in civil rights action which was beyond the jurisdiction of a federal district court).

Indeed, the powers which Congress does have to control the jurisdiction of federal courts, and the remedies they may give, can be justified, if at all, only by the mandatory availability of *state* courts to give those same remedies where indispensable to the vindication of federal rights. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1976), for instance, withdraws the jurisdiction of federal courts to issue injunctive remedies in "a case

involving or growing out of a labor dispute." In *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Court sustained the constitutionality of the Norris-LaGuardia Act, based upon Congress' broad authority to regulate federal court jurisdiction. However, the Court did so in light of and without limiting the force of its earlier holding in *Truax v. Corrigan*, 257 U.S. 312 (1921), that the due process and equal protection clauses of the fourteenth amendment prohibited similar state legislation restricting the jurisdiction of state courts to give injunctions in certain labor disputes. *See also* H.R. Rep. No. 669, 72d Cong., 1st Sess. 10 (1932). As the *Truax* Court observed, "[i]t is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law." 257 U.S. at 334. Whatever the merits of a plaintiff's claim to injunctive relief in a labor dispute may be, *Truax* establishes that at the very least a state court must stand ready to entertain his application for it, give him a fair hearing, and grant the remedy where appropriate.

Anything less means that for some constitutional violations by state and federal governments, the victim may not obtain any judicial review and relief: a proposition abhorrent to any legal system dedicated to the rule of law. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). That federal courts may be powerless to act in such a case reinforces rather than detracts from the duty of state courts to assume jurisdiction. *See Maine v. Thiboutot*, 448 U.S. at 11 n.12.

B. In Violation of Due Process of Law, Proposition 1 Unconstitutionally Links State Court Jurisdiction to Give Necessary Remedies to Limits on Federal Court Jurisdiction

Proposition 1 states, in pertinent part, that "pupil school assignment" and "pupil transportation" remedies may not be used by California state courts:

> (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, *and* (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution. (emphasis added.)

This provision has been construed by the state courts to make their jurisdiction in fourteenth amendment cases turn on what a federal court could do in a similar case. For instance, Judge Cohn of the San Mateo County Superior Court has observed:

> Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of federal courts there is somehow a violation of [the] federal constitution.

Tinsley v. Palo Alto Unified School District, No. 206010 (July 10, 1980), quoted in *Board of Education v. Superior Court*, 448 U.S. 1343, 1345 (1980) (Rehnquist, Circuit Justice). Likewise, the Court of Appeal in this case characterized the effect of Proposition 1 as follows:

> The effect of the amendment was to prohibit state courts, *in desegregation cases*, from ordering school boards to mandatorily reassign and transport pupils on the basis of race, except to remedy a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution under circumstances which would authorize a federal court under federal decisional law to issue such an order.

113 Cal. App. 3d 633, 636-37, 170 Cal. Rptr. 495, 497-98 (emphasis added). As this passage shows, Proposition 1 concerns itself with all "desegregation cases," whether

they arise under the state or the federal constitutions. On its face, the measure restricts the power of California state courts in all such cases to issue only those constitutional remedies which "a federal court would be permitted under federal decisional law to impose."

This Court's decisions establish squarely that "pupil transportation" and "pupil school assignment" remedies may be necessary, and hence mandatory, to remedy certain fourteenth amendment violations. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *cf. Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). Indeed, in this very case the trial court determined that a comprehensive structural remedy embodying these features was necessary on the facts to remedy *de jure* segregation of the Los Angeles public school system.[37] Yet Proposition 1 might, if given effect by this Court, eliminate the right of access of minority litigants to such potentially essential remedies in state courts, even though Congress had tried to strip lower federal courts of their jurisdiction to give comparable remedies. At the very least, under Proposition 1, school segregation litigation in the California courts would be disrupted by any congressional effort to restrict the "busing" orders of the federal courts, whether those efforts were ultimately determined to be constitutional or not.

The threat of Congress attempting to withdraw federal court jurisdiction to issue such remedies is very real. In the past decade, numerous legislative proposals have been made to curb the power of federal courts to use busing as a remedy in school desegregation cases. *See e.g.*, G. Gunther, *Cases and Materials on Constitutional Law* 730-32 (9th ed. 1975); Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 NW. U.L. REV. 319 (1972); Rotunda, *Congres-*

[37] This factual conclusion was erroneously tossed aside by the Court of Appeal, as we make clear in the last section of this brief.

sional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839 (1976). At least three such proposals—S. 1647, S. 1743 and S. 1760—are indeed pending in the current session of Congress, and at least one of these, the Hatch Bill, S. 1760, has been reported out of subcommittee to the full Senate Judiciary Committee.

All of these measures purport to rest upon Congress' concededly broad power to regulate federal court jurisdiction under article III of the Constitution. *But see* Sager, *supra*, at 77-78 n. 187, 87; Tribe, *supra*. Whatever the precise scope of that power, it clearly does not authorize either Congress or the states to deny the jurisdiction of *state* courts to grant constitutionally necessary remedies, as Proposition 1 appears to do if followed to its logical conclusion.

This Court cannot sanction such a result if it is to be faithful to the constitutional principle that *some* court, *state or federal*, must always stand ready to bring recalcitrant government into line with the commands of the Constitution.[38] Professor Hart correctly identified what was at stake in a case such as this when he answered the question of where a litigant can go to get a remedy for a constitutional violation if Congress has shut off access to the lower federal courts:

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[38] Although limitations on the power of the lower federal courts to effectuate adequate remedies in school desegregation cases have not yet been enacted (and although the validity of such measures has not yet been determined), Proposition 1 is unconstitutional. Whatever the breadth of Congress' authority to determine how the fourteenth amendment shall be enforced, *see* Katzenbach v. Morgan, 384 U.S. 641, 654-56 (1966), for the reasons given above, the *states* may not determine that vindication of fourteenth amendment rights shall be the exclusive preserve of the federal courts, and that state courts will meekly follow wherever federal courts are led by Congress. Proposition 1 therefore oversteps the limits of California's legislative authority as of its passage, whether or not objectionable restrictions upon federal court authority are operative, and the measure is unconstitutional on its face.

> The state courts. In the scheme of the Constitution, they are primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, *supra*, 66 Harv. L. Rev. at 1401.

This Court should hold that Proposition 1 is an unconstitutional attempt by the law-making authorities of California to restrict the access of civil rights litigants to remedies in state courts to redress federal constitutional violations.[39]

IV. IN DECIDING THAT THE SEGREGATION IN THE LOS ANGELES PUBLIC SCHOOL SYSTEM DOES NOT VIOLATE THE FOURTEENTH AMENDMENT AS A MATTER OF LAW, THE COURT OF APPEAL ERRONEOUSLY REVERSED THE TRIAL COURT WHEN IT OUGHT TO HAVE OPENED THE RECORD FOR FURTHER FACTUAL INQUIRY

The history of this case is one of monumental effort in the trial court. The original trial in the action lasted for 65 days, involved the introduction of voluminous evidentiary material; and resulted in a reporter's transcript running to 62 volumes. *Crawford I*, 17 Cal. 3d at 287, 551 P.2d at 31, 130 Cal. Rptr. at 727. After the resulting mandate for desegregation of the Los Angeles schools

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[39] There are now pending in the 97th Congress numerous other proposals designed to restrict lower federal court, and Supreme Court, jurisdiction in certain subject matter areas. *E.g.*, S. 158 (abortion); S. 481 (school prayer); H.R. 865 (school prayer); H.R. 867 (abortion); H.R. 72 (school prayer). If the Court upholds Proposition 1 in this case, it is easy to see how state legislators and electorates might try to avoid any judicial review at all in these controversial areas by "tying" state court jurisdiction to federal court jurisdiction.

was affirmed by the California Supreme Court, in an opinion which specifically accepted the lower court's finding of *de jure* segregation,[40] the trial court spent an additional three years monitoring the school board's compliance with the mandate. In the course of that oversight, the Court received over 420 written exhibits, conducted 170 days of hearing and examined the testimony presenting the Board's case on the results of its prior plans, the reports of its own referee, the court-appointed monitoring committee, and the reports of the court-appointed experts (July 7, 1980 order, at 2-3). The trial court then reaffirmed its original conclusion that there was *de jure* segregation in the Los Angeles Unified School District in violation of the fourteenth amendment. Accordingly, the trial court concluded that reexamination of the mandate for desegregation in light of the enactment of Proposition 1 was unnecessary, and it ordered the Board to proceed with desegregation.

The Court of Appeal reversed. In doing so, that court confined its attention to the 1970 findings of the trial court and determined that these findings had been made without the benefit of later opinions of this Court establishing that the essence of unconstitutional, or "*de jure*," segregation is "the purpose or intent to segregate." At that point, the Court of Appeal should have remanded the case to afford the trial court "an opportunity to reexamine the record on the issue of intent" and to "permit the parties to offer such additional evidence as they may desire pertaining to that issue." *Johnson v. San Francisco Unified School District*, 500 F.2d 349, 352 (9th Cir. 1974). Instead, based solely on its review of the findings of the 1970 trial court, and without purporting to make any independent evaluation of the evidence, the Court of Appeals made its own determination that the school segrega-

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[40] *Crawford I*, 17 Cal. 3d at 301, 551 P.2d at 41, 130 Cal. Rptr. at 737.

tion in Los Angeles was not the result of purposeful discrimination.[41]

This analysis has obvious flaws. The Court of Appeal improperly considered only the subsidiary factual findings of the trial court in reaching its conclusion that the segregation in the Los Angeles schools was not the result of purposeful discrimination. It should have examined the entire record of the trial—but that record was not even before it on the appeal below. This is particularly important since the trial court's 1970 judgment was based in part on the state law affirmative duty of the Los Angeles School Board to desegregate its schools. *See Crawford I*, 17 Cal. 3d at 284-285, 551 P.2d at 39 130 Cal. Rptr. at 726. The trial court's 1970 findings for this reason did not exhaustively catalogue the facts of record demonstrating that the segregated condition of the Los Angeles school district originated with "acts done with specific segregative intent and discriminatory purpose." *Cf. Columbus*, 443 U.S. at 466 n.14.[42]

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[41] To the extent that the decision below rejects the trial court's original findings, the action of the Court of Appeal was plainly in error. A reviewing court cannot overturn the findings of fact of the trial court without examination "of the entire evidence." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Even if the Court of Appeal made such an examination, however, it would still be barred from substituting its own inferences for those made by the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). This analysis is not altered by the fact that the decision below was made in the California Court of Appeal. The standard in the California Courts, is, if anything, more stringent. Board of Educ. of Long Beach v. Jack M., 19 Cal. 3d 691, 697, 566 P.2d 602, 605, 139 Cal. Rptr. 700, 703 (1977).

[42] The trial court in this case limited its findings to the period after 1963 when this lawsuit was initiated. There was no consideration whether the segregation in 1963 was an outgrowth of a segregated "dual school system" prior to 1954. On remand, petitioners could establish that Los Angeles was indeed operating such a dual system. *See generally* I. HENDRICK, THE EDUCATION OF NON-WHITES IN CALIFORNIA, 1849-1970 91-104 (1977).

The Court of Appeal also erred in its facile assumption that the Los Angeles District's "maintenance of a neighborhood school system, siting schools in the geographic center of their need, assignment of pupils to neighborhood schools, and failure to provide free transportation for open tranfers" were "neutral acts." *Crawford II*, 113 Cal. App. 3d at 644, 170 Cal. Rptr. at 502. Any determination or decision that a "neighborhood school policy" is in fact neutral, and not a "potent weapon for creating or maintaining" racial segregation requires intensive factual scrutiny. *Swann*, 402 U.S. at 20-21; *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 201-02 (1973); *id.* at 234-35 (Powell, J., concurring). It may also be necessary to extend the court's inquiry to the relationship between school segregation and residential segregation since residential patterns themselves may be the product of an illegally segregated school system, or other unconstitutional state action. *Columbus*, 443 U.S. at 465 n.13; *Swann*, 402 U.S. at 20-21; *Keyes*, 413 U.S. at 201-202; *Crawford I*, 17 Cal. 3d at 299-300, 551 P.2d at 40, 130 Cal. Rptr. at 736-737.

As Justice Stewart has observed, the question whether actions which produce racial separation are intentional, within the meaning of the decisions of this Court, presents difficult and subtle issues of fact. *Columbus*, 443 U.S. at 470-71 (Stewart, J., concurring in the result).

This careful factual scrutiny required in evaluating a claim of constitutional right was not provided by the Court of Appeal's summary conclusion that the trial court erred, eleven years ago, in finding *de jure* segregation in Los Angeles. But that summary conclusion by the Court of Appeal was the predicate for its holding that Proposition 1 must be applied in this case, and, further, that it could be applied without violating petitioners' rights under the fourteenth amendment. Since this Court has granted *certiorari* to review that holding, the manner in which the court below decided the fundamental issue of federal con-

stitutional law on which the questions presented in this case rest must, of necessity, concern the Court. Amici suggest, therefore, that the Court may wish to remand the case without reaching the important constitutional questions presented by Proposition 1 in order to permit the *trial court* to make an initial determination as to the existence or non-existence of purposeful discrimination in the Los Angeles School District in accordance with the legal standards established by this Court.

CONCLUSION

For all of the foregoing reasons, the judgment of the California Court of Appeal should be reversed, and the case remanded for entry of judgment for petitioners. Alternatively, the judgment should be reversed and the case remanded for further fact-findings on the purpose and effect of Proposition 1, and on the existence of segregation in the Los Angeles public schools in violation of the fourteenth amendment.

Respectfully submitted,

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